

Alert European Union 26/2023

CJEU called to rule on asymmetric jurisdiction clauses

Geneva, 23.10.2023

1. References

1.1 Sources

The French Cour de Cassation has requested the Court of Justice of the European Union (CJEU) to deliver a judgement on the validity of asymmetric jurisdiction clauses and to clarify what law should govern their interpretation.

> [France, Cour de Cassation: Decision referring the matter to the CJEU.](#)

1.2 Country Manuals

CM PB	CM EAM	CM Products	CM AM	CM Credits	CM Trustee	CM InsDist
Yes	Yes	Yes	No	Yes	No	No

1.3 Topics

Other

1.4 Key Words

Jurisdictional Means

2. Context

The French Cour de Cassation (CdC) requested the CJEU to issue an interpretative decision pursuant to Article 267 of the Treaty on the Functioning of the European Union (TFEU). This provision allows national tribunals to seize the CJEU in order to clarify the meaning of EU provisions.

Within this context, in April 2023, the CdC decided to transfer to the CJEU an interpretative decision regarding the validity of asymmetric jurisdictional clauses. This issue arose in a case about a contract for the supply of cladding panels, where the contract stipulated that the jurisdiction of the Court of Brescia would apply to any dispute arising out of or in connection with the contract. However, one of the parties to the contract reserved the right to proceed against the other party before any other competent court in Italy or abroad.

The dispute settlement clause described above is an example of a so-called "asymmetric jurisdiction clause". An asymmetric jurisdiction clause is a jurisdictional clause that obliges one party to seize a specific tribunal in case of dispute, while leaving to the other party more freedom in deciding which *forum* would be more suitable to hear a given case. These clauses are particularly common in finance transactions to give, for example, the lender flexibility to sue the borrower in any jurisdiction where the borrower has assets, whereas the borrower may proceed against the lender only in a specific jurisdiction.

The stance adopted by domestic tribunals in the EU and abroad on the validity of asymmetric jurisdiction clauses varies sensibly across jurisdictions. With a view to harmonising the interpretative approach in the EU, the CdC addressed to the CJEU the three following questions:

- > What law should govern the validity of unilateral clauses: EU law or EU Member States' national laws?
- > If EU law governs this question, does EU law prohibit asymmetric jurisdiction clauses?
- > Alternatively, if the question is governed by national laws, how should a court decide which Member State law should be applied?

The background of the first question is Article 25 of Regulation 1025/2012 as updated in 2015 (Brussels Recast Regulation), which governs jurisdiction clauses in agreements. In essence, this provision establishes that parties to a legal relationship may agree on which courts have jurisdiction in case of dispute and the courts thus chosen shall have jurisdiction unless the jurisdictional agreement is null and void as to its *substantive validity* under the law of that Member State. The CJEU will have to decide whether the asymmetry of jurisdictional clauses may be regarded as infringing the substantive validity of the clause under the national law of the Member States.

Depending on the answer to the first question, the CJEU will then analyse either the second or the third interpretative issue. On the one hand, if EU law applies, the CJEU will have to decide whether asymmetric clauses are legitimate with respect to EU law, disregarding each Member State international private law's specificity. On the other, if the CJEU will determine that this matter falls within the scope of Member States national law, then it will have to – finally – shed light on the applicable criteria to determine which national law applies in order to determine the competent court(s).

3. Comments

Considering that the financial industry makes considerable use of asymmetric jurisdiction clauses, the decision of the CJEU is expected to have a significant impact with either outcome.

In the event that the CJEU determines that EU law governs the interpretation of asymmetric clauses, this would lead to a uniform interpretation across the Union. Such clauses would be qualified as valid – or alternatively as invalid – throughout the EU.

If the CJEU concludes that the interpretation (and validity) of asymmetric clauses depends on Member States' domestic laws, two scenarios are imaginable:

- > Asymmetric jurisdictional clauses potentially confer jurisdiction on multiple *fora* and the applicable domestic law, and the underlying validity of the clause, may vary depending on the chosen *forum* creating the risk of unpredictability of judicial results, which is the opposite outcome of what was envisaged with the enactment of the Brussels I Regulation;

- > An interpretative decision on asymmetric jurisdictional clauses may, however, also lead the CJEU to develop univocal criteria to identify the applicable domestic law on a case-by-case basis, which may partially mitigate the above-mentioned uncertainties.

Asymmetric jurisdictional clauses are popular among financial intermediaries, permitting to choose the *forum* in case of dispute, in particular in a lender-borrower contractual relationship. This gives the lender more flexibility to sue a borrower in any jurisdiction where the borrower has assets.

In the most favourable scenario, asymmetric jurisdictional clauses will be deemed valid and enforceable in the whole EU. In the other scenarios, such clauses will either be prohibited, or the judicial result will depend on the Member State(s) involved. Thus, depending on the outcome, EU financial intermediaries will possibly have to adapt their business practice with regard to jurisdictional clauses with EU relevance.

The decision of the CJEU will also have an impact on the effectiveness of asymmetric jurisdictional clauses agreed upon between third-country financial intermediaries and their clients domiciled in the EU. While the exact impact depends on the specific (third) country of establishment of the financial intermediary, the following scenario applies in all cases: If the CJEU finds that asymmetric jurisdictional clauses are invalid under EU law, a client domiciled in the EU could ignore such a clause agreed with his/her third-country financial intermediary and initiate proceedings in his/her country of domicile. The chosen court would declare the jurisdictional clause as void and determine its competence according to the recast Brussels Regulation. The risk of the court declaring itself as competent and the judgement as the only one enforceable in the EU in the same matter would be considerable, in particular in case the client qualifies as a consumer.

It has to be pointed out, however, that even if the CJEU were to rule favourably on asymmetric jurisdictional rules, specificities of private international law (in particular with regard to the time of introduction of proceedings) would still prevent asymmetric jurisdictional clauses agreed upon by third-country financial intermediaries to be enforceable in all cases.

4. Practical Implications

4.1 Immediate Action

No immediate action required at this stage.

4.2 Follow-up Action

BRP will report CJEU findings once the court has issued a decision.

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We are at your disposal for any questions you may have.

Best regards,

BRP Bizzozero & Partners SA

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